Lembaga Kumpulan Wang Simpanan Pekerja v Kesatuan Kakitangan Lembaga Kumpulan Wang Simpanan Pekerja

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-1 OF 1999(W)
CHONG SIEW FAI CJ (SABAH & SARAWAK), ABU MANSOR AND ABDUL MALEK AHMAD FCJJ
5 APRIL 2000

Labour Law *— Trade dispute — Locus standi to represent employees of public sector — Individual contracts of employment entered with employer — Trade union not privy to contracts — Whether Industrial Relations Act 1967 applicable to trade unions in public sector — Whether union's representative action should be struck out*

Labour Law *— Trade union — Public sector trade union — Locus standi to represent employees — Individual contracts of employment entered with employer — Trade union not privy to contracts — Whether Industrial Relations Act 1967 applicable to trade unions in public sector — Whether union's representative action should be struck out*

The respondent was a trade union which purported to represent the employees of the Employees Provident Fund Board. The appellant was the Board governing the affairs of the Employees Provident Fund. By an originating summons, the respondent sought certain orders against the appellant. This was followed by the summons-in-chambers filed by the appellant for the originating summons to be struck out under O 18 r 19 of the Rules of the High Court 1980 ('the RHC'). The appellant's summon-in-chambers was dismissed by the High Court. Their appeal to the Court of Appeal was also dismissed. In making their decision, the Court of Appeal found that since the matter complained of by the appellant's employees was a trade dispute, and that the respondent had been representing them in the negotiation stage, they saw nothing objectionable nor contrary to law for the respondent to initiate a representative action on behalf of its members. As for the application under O 18 r 19 of the RHC, the Court of Appeal's view was that at most it was arguable that a public sector trade union was not barred by law from bringing a representative action on behalf of its members and the respondent should not be deprived of presenting its case in court and to be heard on the merits. The appellant appealed. The issue was whether a trade union in a public sector possesses locus standi to bring an action on behalf of its members past and present on the individual contracts of employment to which the trade union was not a party.

Held, allowing the appeal:

(1) The Industrial Relations Act 1967 has no relevance in the context of this appeal. The Act only caters for trade unions in the private sector to sue on behalf of its members for trade disputes between the parties to the relevant collective agreements. In the present

appeal, the employees of the Board entered into individual contracts of employment with the appellant as regards which the respondent, as a public sector trade union, was not privy (see pp 71C, F–G, 72B). A

(2) No purpose would be served by ordering further proceedings to continue as the respondent clearly had no locus standi to bring an umbrella action on behalf of all its members on their respective individual contracts with their employer (the appellant) for which different individual considerations were relevant and applicable. Both the High Court and the Court of Appeal adopted the wrong approach to an O 18 r 19 application because with the respondent having no capacity to sue in the first place, the originating summons simply could not stand, and therefore, it fell under the category of a case which was obviously unsustainable (see p 80A–B). B C

[Bahasa Malaysia summary D

Penentang merupakan sebuah kesatuan sekerja yang kononnya mewakili pekerja-pekerja Lembaga Kumpulan Wang Simpanan Pekerja. Perayu adalah Lembaga yang menguasai hal-ehwal Kumpulan Wang Simpanan Pekerja. Melalui satu saman pemula, penentang memohon perintah-perintah tertentu terhadap perayu. Ini disusuli oleh saman-dalam-kamar yang difailkan oleh perayu supaya saman pemula dibatalkan di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Saman-dalam-kamar perayu ditolak oleh Mahkamah Tinggi. Rayuan mereka kepada Mahkamah Rayuan juga ditolak. Dalam mencapai keputusan mereka, Mahkamah Rayuan mendapati bahawa oleh kerana perkara yang diadu oleh pekerja-pekerja perayu adalah pertikaian sekerja, dan bahawa penentang telah mewakili mereka di peringkat perundingan, mereka tidak nampak apa-apa yang boleh dibantah atau yang bertentangan dengan undang-undang untuk penentang memulakan tindakan perwakilan bagi pihak ahli-ahlinya. Mengenai permohonan di bawah A 18 k 19 KMT, pandangan Mahkamah Rayuan adalah bahawa paling tidak ia boleh dihujahkan bahawa suatu kesatuan sekerja dari sektor awam tidak dihalang oleh undang-undang daripada membawa tindakan perwakilan bagi pihak ahli-ahlinya dan penentang tidak harus dihalang daripada mengemukakan kesnya di mahkamah dan untuk didengar atas merit. Perayu membuat rayuan. Isu adalah sama ada sebuah kesatuan sekerja dalam sektor awam mempunyai locus standi untuk membawa tindakan bagi pihak ahli-ahli dahulu dan sekarang berdasarkan kontrak pekerjaan individu yang mana kesatuan sekerja bukan suatu pihak kepadanya. E F G H

Diputuskan, membenarkan rayuan tersebut: I

(1) Adalah jelas bahawa Akta Perhubungan Perindustrian 1967 tidak relevan dalam konteks rayuan ini. Akta tersebut hanya berkaitan

dengan kesatuan sekerja dalam sektor swasta untuk mendakwa bagi pihak ahli-ahlinya untuk pertikaian sekerja di antara pihak-pihak kepada perjanjian perkumpulan (collective agreements) yang relevan. Dalam rayuan ini, pekerja-pekerja Lembaga tersebut telah mengikat kontrak pekerjaan individu dengan perayu, yang mana penentang, sebagai kesatuan sekerja sektor awam, tidak privi kepadanya (lihat ms 71C, F–G, 72B).

(2) Tiada hasrat dicapai dengan memerintah prosiding lanjutan diteruskan kerana penentang jelas tidak mempunyai locus standi untuk membawa tindakan perlindungan bagi pihak semua ahli berdasarkan kontrak individu masing-masing dengan majikan mereka (perayu) yang mana pertimbangan individu yang berlainan adalah relevan dan terpakai. Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan telah menerimapakai pendekatan yang salah kepada suatu permohonan di bawah A 18 k 19 kerana memandangkan penentang tidak berkeupayaan untuk mendakwa pertama sekali, saman pemula tidak boleh kekal, dan dengan itu, ia terangkum dalam kategori kes yang jelas tidak boleh dipertahankan (lihat ms 80A–B).]

Notes

For cases on trade dispute, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1179–1183.

For cases on trade union, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1184–1236.

Cases referred to

Alor Janggus Soon Seng Trading Sdn Bhd v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241 (refd)

Bank Negara Malaysia v Mohd Ismail [1992] 1 MLJ 400 (refd)

Buckley v National Union of General and Municipal Workers & Anor [1967] 3 All ER 767 (refd)

Government of Malaysia v Rosalind Oh Lee Pek Inn [1973] 1 MLJ 222 (refd)

Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director-General of Trade Unions & Ors [1990] 3 MLJ 231 (refd)

McKay & Anor v Essex Area Health Authority & Anor[1982] 2 All ER 771 (refd)

National Union of General and Municipal Workers v Gillian & Ors [1946] 1 KB 81 (refd)

Oh Thevesa v Sia Hok Chai [1992] 1 MLJ 215 (refd)

Smith & Ors v Croft & Ors (No 2) [1987] 3 All ER 909 (refd)

Upholsterers International Union of North America, Local No 1 v Hankin & Struck Furniture Ltd and Struck (1966) 54 WWR 574 (refd)

Legislation referred to

Industrial Relations Act 1967 ss 2, 18(5), 26(2), 52(1), Parts II, III, IV, V and VI
Labour Relations Act, RSBC, 1960, ch 205 ss 4, 6
Local Authorities Superannuation Fund Act 1977
Local Authorities Superannuation Fund (Amendment) Act 1980 s 11A
Rules of the High Court 1980 O 14, O 18 r 19(1)(a), (b), O 33 r 2
Statutory and Local Authorities Pensions Act 1980 ss 3, 16A
Trade Unions Act 1959 ss 25, 50(1)

Appeal from: Civil Appeal No W–02–736 of 1995 (Court of Appeal, Kuala Lumpur)

Cyrus Das (*Steven Thiru* with him) (*Shook Lin & Bok*) for the appellant.
Dominic Puthucheary (*Mohan Ghandi* and *Firoz Hussein* with him) (*Mohan Ghandi & Associates*) for the respondent.

Abdul Malek Ahmad FCJ (delivering judgment of the court): By originating summons dated 7 September 1991, the respondent as plaintiff in the High Court sought the following orders against the appellant who was then the defendant:

(1) That the employees of the defendant who opted to become pensionable as a result of the implementation of the Harun Scheme of service are entitled to participate and benefit under the Staff Provident Fund from its date of implementation until the date of the Harun Scheme of implementation becoming effective.

(2) That employees of the defendant who opted to remain eligible for Employees Provident Fund as a result of the Harun Scheme are entitled to all rights under the Staff Provident Fund.

(3) Costs of and incidental to this application be costs in the cause.

(4) Such further and/or other relief as may this Honourable Court deems fit and proper to grant.

This was followed by the summons in chambers filed by the appellant dated 9 November 1991 for the originating summons to be struck out under O 18 r 19 of the Rules of the High Court 1980 ('the Rules') or under the inherent jurisdiction of the court on the grounds that it disclosed no cause of action, and/or it was frivolous and/or vexatious, and/or it was an abuse of the process of the court.

The prayers of the originating summons were subsequently amended on 14 May 1992 to read as follows:

(1) That the *members of the plaintiff who are and were the* employees of the defendant who opted to become pensionable as a result of the implementation of the Harun Scheme of service are entitled to participate and benefit under the Staff Provident Fund from its date of implementation until the date of the Harun Scheme of implementation becoming effective.

(2) That *members of the plaintiff who are and were the* employees of the defendant who opted to remain eligible for Employees Provident Fund as

A a result of the Harun Scheme are entitled to all rights under the Staff Provident Fund.

(3) Costs of and incidental to this application be costs in the cause.

(4) Such further and/or other relief as may this Honourable Court deems fit and proper to grant.

B The High Court dismissed the appellant's summons in chambers on 2 November 1995. Their appeal to the Court of Appeal was heard on 16 July 1997 and it was dismissed with costs on 29 April 1998. Hence this appeal before us.

When leave to appeal to this court was granted on 2 February 1999, the C question posed was:

> Whether a Trade Union in public sector possesses locus standi to bring an action on behalf of its members past and present on the individual contracts of employment to which the Trade Union was not a party.

The facts are really not an issue. The dispute was as regards employees of D the Employees Provident Fund Board ('the Board') who came under the Harun Scheme and the Cabinet Committee Scheme. The respondent is a trade union which purports to represent the said employees while the appellant is the Board governing the affairs of the Employees Provident Fund ('the EPF').

Only employees in Grade B and below are eligible to be members of the E respondent. In 1958, the Staff Provident Fund ('the SPF') was established by the EPF for its employees where both employees and employers were required to contribute one per cent extra to the SPF. Upon retirement, an employee was entitled to withdraw from both the EPF and the SPF.

The existing terms were replaced by Service Circular 1/75 which was F issued on 15 January 1975. In particular, paras 177 and 178 states:

177 The rules and regulations governing the terms and conditions of service obtaining in the Statutory Authority shall cease to be applicable to those employees who opt to accept the New Salaries and terms and conditions of service as set out in this Service Circular.

G 178 Steps are being taken to repeal, cancel or amend the relevant laws, circulars, orders and instructions as the case may be to bring them in conformity with the terms of this Service Circular.

It was also provided in paras 156 and 158 that:

156 In respect of employees who are governed by the New Salaries and terms and conditions of service set out in this Service Circular a fund H known as the Statutory Authorities Superannuation Fund shall be established.

158 All employees who, prior to the date of conversion, were contributors to the Provident Fund Schemes of the respective Statutory Authorities, shall have the total credits in their Provident Funds plus interest thereon transferred to the Statutory Authorities Superannuation Fund.

I

By Service Circular 3/77 dated 31 March 1977, the Cabinet Committee Scheme came back into force and absorbed the Harun Scheme. This

circular was backdated to 1 January 1976. By virtue of para 7.17 it was provided that if one opted to be pensionable, the sum was drawn from the Consolidated Fund to which all monies standing in the name of the employee in the common fund was remitted to. Otherwise it was drawn only from the EPF to which the employee was already a member.

The Statutory and Local Authorities Superannuation Fund Act 1977 ('the Act') came into force on 1 May 1969 and the amendment Act in 1980, which came into force on 1 January 1981, added a new s 11A which reads:

> All pensions, gratuities and other benefits granted under the Act shall be charged on the Consolidated Fund.

In effect, all the employees of the Board elected to convert to the Harun Scheme and when they exercised this option, they ceased to contribute to the SPF and all moneys standing to their credit as at the date of the option were transferred to the Statutory Authorities Superannuation Fund.

The crux of the matter is well laid out in the leading judgment, which is one of two judgments, of the Court of Appeal against which decision this appeal is based, where the relevant extract reads:

> A notable feature of both service circulars is the creation of two categories of employees in the statutory authorities namely those who converted to come under both schemes and exercised their options to be emplaced on the pensionable scheme and entitled to pension benefits and those who opted for the EPF scheme. All the Board's employees exercised their rights of conversion to both schemes with some opting to come under the first category of employees whilst others opted for the second category. It is in respect of both categories of employees that the Amended Originating Summons is filed. One aspect of it relates to those who retired after 1 January 1975 and who had been contributing to the SPF before they exercised their options. They contend that in addition to the pension benefits that they will enjoy upon retirement, they should also be paid the contributions they had made or made by the Board on their behalf, to the SPF.
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> Another aspect of the Amended Originating Summons relates to those employees who had opted to remain eligible for provident fund benefits and it is their contention that they are entitled not only to EPF but also to the SPF benefits which they had contributed before that fund was abolished.
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> As these issues turn on the construction and interpretation to be given to both service circulars, the merits of which have yet to be argued and determined, I propose to say no more but only to draw attention to the numerous and lengthy affidavits filed by the Union and the Board containing their differing contentions as to what benefits the Board's retiring employees are to enjoy and how the contributions to the SPF are to be distributed in compliance with the two service circulars.

The problem came about because the respondent was acting for the employees who retired under the Harun Scheme and the Cabinet Committee Scheme and purported to bring the action not in the employees' names but in its own name for and on their behalf claiming that the employees were still entitled to the contributions and benefits under the SPF. It was the argument of learned counsel for the appellant that the employees should file the action in their own names.

A We were told that the problem would not arise if the trade union was a private sector trade union in view of s 52(1) of the Industrial Relations Act 1967 ('the IRA'). The said provision states that Parts II, III, IV, V and VI of the IRA, which deals with trade unions, shall not apply to any government service or to any service of any statutory authority or to any workman employed by the government or by any statutory authority. This, B as explained by learned counsel for the respondent, is because the Public Services Department supervises all agreements entered into by the public service employees.

Part II of the IRA deals with the protection of rights of workmen and employers and their trade unions while Part III of the IRA contains the C recognition and scope of representation of trade unions. Part IV of the IRA specifies the details in relation to collective bargaining and collective agreements. Part V of the IRA provides the procedure for conciliation whereas Part VI of the IRA talks about representations and dismissals.

It is, therefore, quite clear that the IRA has no relevance in the context of this appeal although learned counsel for the respondent did make an D attempt to draw attention to sub-s (2) of s 26 of the IRA which provides that the Minister may of his own motion or upon receiving the notification of the Director-General under sub-s (5) of s 18 of the IRA refer any trade dispute to the Industrial Court if he is satisfied that it is expedient so to do.

The proviso to that subsection states that in the case of a trade dispute E in any government service or in the service of any statutory authority, reference shall not be made except with the consent of the Yang di-Pertuan Agong or State Authority as the case may require.

Apart from the fact that s 18 of the IRA comes under Part V thereof, which is not applicable to the respondent, s 26 of the IRA falls under Part VII, which is not included in s 52 of the IRA, but the fact is the section F cannot apply at all as the Minister's reference of the trade dispute is to the Industrial Court while in this case it is the respondent who has filed proceedings in the High Court.

In any case, the IRA only caters for trade unions in the private sector to sue on behalf of its members for trade disputes between the parties to the G relevant collective agreements, the cognisance of which by the court shall be deemed to be an award and binding on the parties.

The definitions in s 2 of the IRA go a long way to support this finding and they are reproduced below for ease of reference:

> 'collective agreement' means an agreement in writing concluded between an H employer or a trade union of employers on the one hand and a trade union of workmen on the other relating to the terms and conditions of employment and work of workmen or concerning relations between such parties;
>
> 'Court' means the Industrial Court appointed under Part VII and includes, unless the contrary intention appears, any court under s 22 constituted for the purpose of dealing with any trade dispute or matter I referred to it, and any division thereof;
>
> 'party', with reference to a trade dispute, means a trade union of workmen acting for all or any number of its members in the trade dispute, or

an employer acting for himself in the trade dispute, or a trade union of employers acting for all or any number of its members in the trade dispute;

'trade dispute' means any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment or the conditions of work of any such workmen.

In the appeal before us, the employees of the Board entered into individual contracts of employment with the appellant as regards which the respondent, as a public sector trade union, is not privy.

Learned counsel for the appellant also submitted that in view of the fact this was a collective action, the issue of limitation would be denied to the appellant as those employees who were actually barred from filing the action had been grouped together with those who were not. Further, the amount of pensions and gratuities deductible for wrongs done in office or for ceasing to be a resident in Malaysia for each and every employee cannot be calculated as provided for in ss 3 and 16A of the Statutory and Local Authorities Pensions Act 1980 ('the SLAPA').

Section 3 of the SLAPA states:

Pension etc not an absolute right 3 (1) No employee shall have an absolute right to compensation for past service or to any pension, gratuity or other benefit under this Act.

(2) Where it is established to the satisfaction of the Minister by an appropriate authority that an employee has been guilty of negligence, irregularity or misconduct, the Minister may reduce or withhold the pension, gratuity or other benefit for which such employee would be eligible but for this section.

Section 16A of the SLAPA deals with the circumstances in which a person shall be disqualified from being paid a derivative pension or derivative retiring allowance where he is not resident or ceases to be a resident in Malaysia.

Learned counsel further reiterated that a trade union could not sue on behalf of employees who were members although it could sue in its own name for injury. The position was strengthened, he added, as employment contracts in the public sector were peculiar and not similar to a collective agreement.

He cited *Government of Malaysia v Rosalind Oh Lee Pek Inn* [1973] 1 MLJ 222 where it was held that the contract between a public servant and the government was of a special kind, as once appointed the government servant acquired a status and his rights and obligations were no longer determined by consent of both parties but by statute or statutory or administrative rules made by the government. In the present case, learned

counsel had argued, the option letter itself as provided in para 170(iii) of the Service Circular 1/75, was irrevocable and constituted a contract of employment between the employee and the appellant. The option conferred an individual right and the privity of contract was only between the individual employee and the appellant.

Should the employee exercise his individual right of suing, the appellant would be entitled to certain legal defences which are presently denied by this umbrella action. Learned counsel further submitted that umbrella actions could not be used as a device to circumvent litigation. Among those on whose behalf the respondent was taking action must surely include retirees. Since the originating summons was filed on 7 September 1991, only those employees who retired within six years before that date would not be barred by limitation.

Learned counsel for the appellant reminded us that the question to be dealt with was the scope of representation as a trade union should only function as a bargaining agent where it could only negotiate but not sue. He laid emphasis on the fact that this was the first time a public sector trade union had sued on behalf of individual employees. In conclusion, he said that a trade union could not sue on behalf of rights claimed on individual contracts of employment of employees in the public sector as in statutory authorities nor could it sue on behalf of former employees.

Learned counsel for the respondent started off his submissions by referring to *Oh Thevesa v Sia Hok Chai* [1992] 1 MLJ 215 where it was held that the summary procedure under O 18 r 19(1)(a) and (b) of the Rules could only be adopted when it could be clearly seen that a claim or an answer was on the face of it obviously unsustainable. If there was a point of law which required serious discussion, an objection should be taken on the pleadings and the point set down for arguments under O 33 r 2 of the Rules.

He informed the court that the appellant was the trustee of the fund and had recognised the respondent as representing the employees. This was based on the letter dated 15 December 1989 from the General Manager of the appellant to the Secretary of the respondent where the effect of the relevant paragraph in the letter stated that the respondent had the right to bring the matter to the High Court to obtain a declaration as proposed by it. In that regard, he added, it was not appropriate for the appellant to contest the respondent's application in this matter as the appellant had made a final decision. Any further action to be taken by the respondent was entirely up to the respondent itself. We must emphasise here that the contents of the appellant's letter cannot be made a basis to bind us into granting the declarations asked for as we have to examine the question of locus standi. It was, at best, a suggestion on the appellant's part due to the failed negotiations but the question here is whether the employees and the respondent had taken the correct step in the proceedings.

Learned counsel further argued that locus standi was not a question of clear law as it concerned facts based on negotiations on the matter and the rights acknowledged by the appellant. He was of the opinion that O 33 of the Rules was the relevant order and not O 18 of the Rules.

At that point, we asked counsel for the respondent for any authority in relation to O 18 r 19 of the Rules in relation to locus standi. He had none but argued that the Court of Appeal had taken a lot of trouble to raise the point.

He referred to the relevant portion of the leading judgment of the Court of Appeal which states as follows:

> As I have indicated earlier the objection on locus standi was raised summarily in an O 18 r 19 application in the court below. The law on the success or otherwise of such an application is well settled. It is only in plain and obvious cases that a pleading can be struck out as disclosing no cause of action and/or frivolous or vexatious and/or an abuse of the process of court, as the effect of such a striking out is to deprive an unsuccessful litigant to such summary proceedings, of his day in court.
>
> On the facts of this appeal, at most it is arguable that a public sector trade union is not barred by law from bringing a representative action on behalf of its members and on this point alone, the union should not, I consider be deprived of presenting its case in court and to be heard on its merit.

Since the hearing of this appeal, counsel for the appellant by letter had drawn our attention to *Smith & Ors v Croft & Ors (No 2)* [1987] 3 All ER 909 applied in *Alor Janggus Soon Seng Trading Sdn Bhd v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241 where it was held that the point on locus standi could be raised under O 18 r 19 of the Rules.

Learned counsel explained that there was four hundred employees involved since 1975 but there were only two hundred left in 1991. At present there were only eighty working. The rest had retired or had passed away. To our mind, these figures only had the effect of strengthening the appellant's arguments on limitation and other defences if the employees had sued in their own names.

Learned counsel for the respondent emphasised that the respondent was not asking for damages or money but only the rights to the fund. If the court was to dismiss the action at this stage, the respondent would be estopped from raising the relevant issues. He insisted that the appellant never raised the issue of disqualification or limitation on the claim during the negotiations. Based on the letter sent by the appellant, all the issues were to be resolved at the trial. Learned counsel reiterated that a representative action could be brought by a trade union as there was no statutory provision preventing a trade union from representing its members.

He referred to s 25 of the Trade Unions Act 1959 ('the TUA') which reads:

> Proceedings by and against trade unions
>
> (1) A registered trade union may sue and be sued and be prosecuted under its registered name.
>
> (2) An unregistered trade union may be sued and prosecuted under the name by which it has been operating or is generally known.
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> (3) A trade union whose registration has been cancelled or withdrawn may be sued and prosecuted under the name by which it was registered.

(4) Execution for any money recovered from a trade union in civil proceedings may issue against any property belonging to or held in trust for the trade union other than the benevolent fund of a registered trade union.

(5) Any fine ordered to be paid by a trade union may be recovered by distress and sale of any movable property belonging to or held in trust for the trade union in accordance with any written law relating to criminal procedure.

(6) In any civil or criminal proceedings in which a registered trade union is a party such trade union may appear in such proceedings by any one of its officers or by an advocate and solicitor.

He also pointed out that sub-s (1) of s 50 of the TUA stated that the funds of a registered trade union might, subject to the relevant legislation, be expended only for the objects mentioned in that subsection including, as stated in para (c):

> the prosecution or defence of any legal proceeding to which the trade union or any member thereof is a party, when such prosecution or defence is undertaken for the purpose of securing or protecting any right of the trade union as such or any right arising out of the relations of any member with his employer, or with a person whom the member employs.

As for the IRA, learned counsel for the respondent agreed that it was irrelevant for purposes of being considered in this appeal. It was a special Act, he said, to govern conduct in the Industrial Court in respect of trade disputes.

We stopped short learned counsel at this juncture and asked him what would be the position if he were in the shoes of the appellant as defendant and discovered that the plaintiff had no locus standi. What then, would he do? The prompt reply was that he would go under O 33 rr 2 and 5 of the Rules as issues of law under O 18 procedure which required considerable argument. He suggested that learned counsel for the appellant could then take it up as a preliminary point.

He referred to two cases. One was *National Union of General and Municipal Workers v Gillian & Ors* [1946] 1 KB 81 where the case head note stated that a trade union can, in general, maintain an action in tort, and an action for libel was no exception to that rule. The facts were that the trade union had brought an action in their registered name claiming damages for libel against the General Secretary of the Chemical Workers' Union and another official of that trade union in respect of matters contained in a certain circular. They also claimed damages against the two defendants and a firm of printers in respect of a libel allegedly contained in the issue of the Chemical Worker in August 1944.

The second case was *Buckley v National Union of General and Municipal Workers & Anor* [1967] 3 All ER 767. The plaintiff in that case was a paid-up member of the defendant and employed at a factory. She was walking along a passage and passed a cleaner who was washing the floor and who told her to walk on the dry side, that is, the side that the cleaner had

mopped. The plaintiff walked a few further paces when she slipped and fell and was injured. She consulted the second defendant, who was the appropriate union officer, to whom she stated initially, when he explained to her what negligence on the part of her employers meant, that her fall was a pure accident. A

The union officials considered that there was no negligence on the part of the employers, and no steps were taken to institute proceedings against the plaintiff's employers, but a claim for industrial injury benefit was put forward. The union officials did not inform the plaintiff that, after the expiration of three years from the accident, any right of action for negligence against her employers would become statute-barred. By r 34 of the union's rules, the national executive committee might authorise the district secretary to provide legal assistance for a paid-up member in a matter connected with his employment if the district secretary were satisfied on enquiry that the member should take legal action. B C

The plaintiff claimed damages against the union for breach of contract, and against the second defendant for negligence, in failing to take adequate steps to pursue a claim against her employers and to pursue her cause of action or to warn her that on 8 June 1963, her cause of action would become statute-barred. The statement of claim did not allege that the second defendant failed to make proper enquiry. D

It was held that the union were under a contractual obligation to the plaintiff, as a paid-up member, in relation to the provision of legal assistance if the district secretary reasonably and with proper care after proper enquiry was satisfied that the member should take legal action and that in order to recover damages against the union for breach of contract, or against the second defendant for alleged negligence, the plaintiff must show that she had lost a right of action that had some prospect of success; but on the evidence the plaintiff had had no prospect of success in an action against her employers and there was no breach of contractual duty by the union nor any breach of duty of care by the second defendant. E F

An interesting observation is the editorial note which states that although on the facts the plaintiff in that case had lost no right of action of any value, and the union and the second defendant were not in breach of any duty towards her, yet the decision there is authority for the principles which govern liability of a union or an officer of a union in relation to assisting members in pursuing legal claims by actions at law. G

We have studied these two cases carefully and find them quite distinguishable on the facts in relation to the appeal before us. Learned counsel for the respondent also referred us to the rules and constitution setting up the respondent where the objects as stated in r 2 which are relevant for the appeal are the following paras (1), (5) and (6): H

> (1) To secure the complete organisation of all monthly paid staff employed by the Employees Provident Fund Board, whose place of work is in the Federation of Malaya, and to promote the industrial social and intellectual interests of its members. I

A (5) To promote the material, social, and educational welfare of the members in any lawful manner which a general meeting or the Executive Council may deem expedient.

(6) To provide, if decided upon by the Executive Council, legal assistance to members in connection with their employment.

B He also pointed us to a trade union case where O 18 r 19 of the Rules was resorted to namely *Kesatuan Sekerja Pembuatan Barangan Galian Bukan Logam v Director-General of Trade Unions & Ors* [1990] 3 MLJ 231 where among other things it was held that it was certainly arguable that the plaintiff could invoke the concept of legitimate expectation of being afforded the opportunity of making representations before the Director-C General of Trade Unions proceeded to register the in-house union as a trade union. Accordingly, the plaintiff had the necessary locus standi to maintain the suit against the Director-General of Trade Unions. Similarly, the allegations of conspiracy against the Director General of Trade Unions and the second and the third defendants disclosed a cause of action against them and so constituted a sufficient basis for locus standi to enable the D plaintiff to maintain the suit against them also. As for the in-house union, it would naturally be affected should the plaintiff succeed in obtaining the declaration that its registration as a trade union was a nullity. As such, the in-house union was a necessary party to the proceedings and so the statement of claim clearly disclosed a cause of action against it. It also held E that the summary procedure under O 18 r 19 of the Rules could only be adopted where it could be clearly seen that the claim or answer was on the face of it obviously unsustainable. Further, it said that the power to strike out any pleading or any part of a pleading under O 18 r 19 of the Rules was not mandatory but permissive and conferred a discretionary jurisdiction to be exercised having regard to the quality of, and all the circumstances F relating to, the offending plea. Again, our view is that the facts in that case are different from those in the case before us.

In reply, learned counsel for the appellant informed us that the law had changed with the amendments made to the Courts of Judicature Act 1964. In particular, he read r 108(1)(c) of the Rules of the Federal Court 1995 which stated:

G

When granting leave to appeal the court may —

(a) ...;

(b) ...;

(c) determine the questions or issues which ought to be heard in the appeal; and

H

(d) ... .

He stressed that the issue was not whether it should have gone under O 18 or O 33 of the Rules but the question of the scope of O 18 r 19 of the Rules. He said that this court had taken a different stand as a matter of law could I be determined at the summary stage even on affidavit evidence.

He read a passage in *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MLJ 400 at p 408, which, though concerned with O 14 of the Rules, was

based on the same principle as regards dealing with the matter summarily without the necessity of a trial. The said passage says:

> Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied that it is unarguable, the court is not prevented from granting a summary judgment merely because the question of law is at first blush of some complexity and therefore takes a little longer to understand.

He also referred to *McKay & Anor v Essex Area Health Authority & Anor* [1982] 2 All ER 771 which held that although the power to strike out a claim under O 18 r 19(1) was discretionary, a defendant had a prima facie right to be relieved of having to meet a claim which disclosed no reasonable cause of action, and, if he could succeed in showing that the claim was bound to fail, he ought not to be denied that relief merely because he still had to meet other claims by the plaintiff, unless there were strong reasons for allowing the bad claim to go to trial. Since the child's claim showed no reasonable cause of action it should be struck out, and the appeal would accordingly be allowed.

He argued that there was no dispute that these were individual contracts between the employees and the employer and although he agreed that it was a question of substance, the appellant was not able to answer each employee's defence individually.

It was not the appellant's contention, he continued, to deny the fact that the respondent could not bring an action but it must be in accordance with the law in the names of each and every individual employee who was claiming. This, he submitted, was not a representative action citing *Smith & Ors v Cardiff Corp* in support.

He reiterated that ss 25 and 50 of the TUA would only apply where the rights of the trade union were affected as opposed to the rights of the members. He cited *Upholsterers International Union of North America, Local No 1 v Hankin & Struck Furniture Ltd and Struck* (1966) 54 WWR 574 (SC) where it was held that a claim by a trade union 'on behalf of itself and on behalf of its members' for alleged breaches of ss 4 and 6 of the Labour Relations Act, RSBC, 1960, ch 205, was not maintainable, but the individual union members who had suffered actual damage might sue in their individual capacity.

In a nutshell, the arguments canvassed by learned counsel for the appellant are:

(a) the respondent is not privy to the individual contracts of employment between the appellant and the employees founded on the terms and conditions contained in the two service circulars;

(b) the respondent is not seeking to assert any right accrued to it nor is it maintaining that its rights have been affected by the actions of the appellant;

(c) the respondent is a separate legal entity and cannot bring a representative action on behalf of its members as membership in the respondent is not automatic;

(d) unlike the respondent, a private sector trade union, although not a party 'to the individual contracts of employment, can still represent and sue on behalf of its members pursuant to any trade dispute made necessary by the fact that the trade union in the private sector is a necessary party to a collective agreement concluded between an employer or a trade union of employers on one hand and a trade union of workmen on the other;

(e) a public sector trade union can only represent and negotiate on behalf of its members but it cannot sign individual contracts of employment or enter into collective agreements with any public body and therefore cannot sue on behalf of its members on contracts of employment entered into by its members individually;

(f) since the employees are not named in the umbrella action, the appellant is denied certain legal defences in respect of certain employees.

On the other hand, learned counsel for the respondent relied on the proviso to sub-s (2) of s 26 of the IRA which we, like the Court of Appeal, found to be not relevant to the present appeal. At the same time, he had contended that the IRA was not relevant for consideration as it did not apply to a public sector trade union like the respondent. He was of the view that based on the constitution and the rules setting up the respondent, it had the mandate to give legal assistance to its members to the point of suing on their behalf in its name. As for the application to strike out the originating summons, he submitted that the proper procedure was to make an application under O 33 and not O 18 of the Rules.

In making their decision, the Court of Appeal found that since the matter complained of by the appellant's employees was a trade dispute, which we hold to be erroneous, and that the respondent had been representing them in the negotiation stage, they saw nothing objectionable nor contrary to law for the respondent, in view of the relevant legislation pertaining to it implying a legal mandate to represent the employees, to initiate a representative action on behalf of its members. They also held that in enjoining all the members of the respondent by a single representative action founded on similar facts and involving common issues, this was the most equitable and practical approach as it saved time and expense and prevented duplication of the same causes of action.

As for the application under O 18 r 19 of the Rules, the Court of Appeal's view was that at most it was arguable that a public sector trade union was not barred by law from bringing a representative action on behalf of its members and the respondent should not be deprived of presenting its case in court and to be heard on the merits.

Having reviewed the authorities and the arguments, however, we are inclined to agree with learned counsel for the appellant. The question posed

to us at the leave stage in one fell swoop takes care of the issues canvassed before us. We feel that no purpose would be served by ordering further proceedings to continue as the respondent clearly has no locus standi to bring an umbrella action on behalf of all its members on their respective individual contracts with their employer, the appellant, for which different individual considerations are relevant and applicable. We are unanimously of the view that both the High Court and the Court of Appeal adopted the wrong approach to an O 18 r 19 application because with the respondent having no capacity to sue in the first place, the originating summons simply cannot stand and, therefore, it falls under the category of a case which is obviously unsustainable. Technically, this, of course, does not prevent the employees from bringing actions themselves in their names separately or together.

On the facts and circumstances of this particular case, we would answer the question posed in the negative, allow the appeal with costs here and in the courts below, and set aside all orders made in those courts. The deposit is refunded to the appellant.

Appeal allowed.

Reported by Jafisah Jaafar